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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-834

MORTON FUNGER, et al.,

Petitioners,

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION OF RESPONDENTS THE SPECIAL TAXING DISTRICT OF FRIENDSHIP HEIGHTS AND THE HILLS AND THE FRIENDSHIP HEIGHTS VILLAGE COUNCIL

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Respondents the Special Taxing District of Friendship Heights and The Hills and the Friendship Heights Village Council respectfully submit that a writ of certiorari should not issue to review the opinion and judgment of the Maryland Court of Appeals entered in this case on July 15, 1977.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals is now reported officially at 280 Md. 686 (1977).

JURISDICTION

Except as discussed in Argument I, *infra*, Respondents are satisfied with Petitioners' jurisdictional statement.

QUESTION PRESENTED

Whether the due process clause of the fourteenth amendment requires that a legislative body considering a comprehensive zoning amendment allow unlimited rights of testimony and cross-examination?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Aside from the constitutional and statutory provisions set forth in the Petition for Certiorari, this case involves Sections 59-122, -195, and -208 of the Montgomery County Code (1972), which are set forth in an Appendix hereto. All references are to the Code sections in force at the time of the zoning actions involved here.

STATEMENT OF THE CASE

With few exceptions the errors Respondents perceive in Petitioners' statement of the case are not material to the question before the Court. Thus, no elaborate rehearsal of the facts is necessary here. A few points, however, require clarification.

Friendship Heights is located on the boundary of Montgomery County, Maryland and the District of Columbia. The actions of the Montgomery County Council which form the basis for this case involved the zoning of the entire Maryland portion of Friendship Heights, including all of the property forming the Friendship Heights central business district and the Friendship Heights special taxing district.

It is essential to note that, before taking the actions complained of, the Montgomery County Council had before it evidence accumulated in a decade and a half of hearings before the Planning Commission and before the Council itself. At the final hearing which resulted in the rezonings in question here, the Council kept the record open until all parties, including Petitioners, had had an opportunity to submit both oral and written testimony. Moreover, opportunities to rebut any evidence presented at the hearing were also afforded to Petitioners by the Council.[1]

ARGUMENT

I. PETITIONERS' FAILURE TO RAISE THEIR CONSTITUTIONAL CLAIM BEFORE THE MARYLAND COURT OF APPEALS DEPRIVES THIS COURT OF JURISDICTION OVER THIS CONTROVERSY

For a party to obtain review in this Court of a state court decision on grounds that it offends the Federal Constitution, it is essential that the constitutional claim have been presented to and decided by the highest state court. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Bailey v. Anderson*, 362 U.S. 203 (1945); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022

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[1] There is no estimate as to the total pages of testimony taken or materials produced in all these proceedings. Suffice it to say that the total record *extract* before the Maryland Court of Appeals consisted of nearly 5,000 pages. The hearing (on the preliminary Sector Plan) lasted five days, involved nearly one hundred witnesses and produced a transcript in excess of 1,300 pages in addition to documentary material. The Sector Plan hearings in 1974 involved over seventy witnesses, a transcript of over 500 pages and numerous written documents.

(1977). Unless the record shows that the federal question was raised and decided in the state court, this Court lacks jurisdiction. *Cardinale*, 394 U.S. at 438. Moreover, when the state court has failed to rule on the federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

The record here shows no indication that the federal constitutional issue which Petitioners raise before this Court was presented to or decided by the Maryland Court of Appeals. Instead, this entire proceeding has been a dispute over the procedures required by Maryland state and Montgomery County law. This was made explicit in the opinion of the Montgomery County Circuit Court which stated:

> The Court should clarify its ruling. First of all, *this Court does not hold that the due process clause of the United States Constitution mandates the result reached.* The holding that the right to cross-examine attached is *based purely upon a statutory right . . . .*[2]

Petitioners' brief in the Court of Appeals did not address itself to any federal constitutional issues.[3] Indeed, their brief specifically denied that this case bears any relationship to *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), which Petitioners now claim supports review.[4] The Petitioners' own statement of the issues

[2] *In re* Application No. F-947, For Amendment to the Zoning Ordinance Map, Law No. 40639 (Montgomery County, Md. Circuit Court July 15, 1976) (Petition for Certiorari at 109a-110a) (emphasis added).

[3] The constitutional argument was apparently made to the Circuit Court, which found no reason to reach it. In their appeal, Petitioners abandoned this claim, choosing to rely entirely on statutory grounds to support the Circuit Court's decision. *See* Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541, 544 (1948).

[4] "[This case] is a challenge of a zoning action of the sort contemplated in *Euclid* v. *Ambler* 272 U.S. 365 (1926) and other similar cases, and has no relationship to the issues decided in *Eastlake*." Brief for Appellees—Cross-Appellants, Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483 (1977) at 19.

presented to the Maryland Court of Appeals was specifically limited to questions of interpretation of the Montgomery County Code[5] and their brief to that court did not contain any citation to the Federal Constitution. Not surprisingly, the Maryland Court of Appeals did not address itself to the question raised here of whether the U.S. Constitution required the Montgomery County Council to afford Petitioners unlimited testimony and cross-examination.[6] The constitutional issue, therefore, was first fully raised in this Court. Under this Court's established precedents, Petitioners' failure to make their constitutional argument below deprives this Court of jurisdiction and the Petition for a Writ of Certiorari must be denied.

[5] The single question presented by Petitioners below was:

> Whether the County Council violated the requirements of the Montgomery County Zoning Ordinance when it deprived owners of property downzoned of their right to reasonable cross-examination of witnesses and a reasonable opportunity to be heard in the proceedings on Sectional Map Amendment Application No. F-947.

Brief for Appellees—Cross-Appellants, *supra* note 4, at (iii).

[6] The Court of Appeals' only mention of this issue is a passing reference to *Eastlake*, indicating that this Court had approved rezoning actions taken without a hearing. *See* Montgomery County v. Woodward & Lothrop Inc. [hereinafter C of A Opinion], 280 Md. 686, 713-14, 376 A.2d 483, 498 (1977) (Petition for Certiorari at 48a). Mere passing reference to a constitutional point does not constitute full, reasoned consideration.

II. PETITIONERS HAVE NOT RAISED ANY IMPORTANT QUESTIONS OF FEDERAL LAW IN THEIR ATTACK UPON THE PROCEDURES FOLLOWED BY THE MONTGOMERY COUNTY COUNCIL.

A. Petitioners Misconstrue This Court's Decision in City of Eastlake v. Forest City Enterprises, Inc.

Petitioners now base their argument regarding the importance of the procedural issues they perceive in this case upon this Court's recent decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). In *Eastlake*, a city charter provision requiring that all zoning amendments be approved by a 55% vote in a referendum was upheld against arguments that it constituted an improper delegation of legislative authority and violated the due process clause of the fourteenth amendment. U.S. const. amend. XIV, § 1. Petitioners argue (Petition for Certiorari at 13-15) that the *Eastlake* decision turned on the fact that the property owner there was seeking to "upzone" the tract (i.e., increase the permissible intensity of use), while the Council's action in this case, at least in part, "downzoned" Petitioners' land (i.e., decreased the intensity of use allowed). In support of their position, Petitioners identify two footnotes in the Court's opinion in *Eastlake* which note that no downzoning was present there.[7] Neither footnote, however, is concerned with the applicability of the due process clause; instead they discuss possible grounds for seeking either a hardship exception to the zoning ordinance, or its overturning on substantive due process grounds. Justice Stevens' dissent even more forcefully indicates that the character of the zoning change was not

[7] *Eastlake*, 426 U.S. at 674 n. 8, 679 n. 13.

dispositive in *Eastlake*. Commenting on the theory that since only an upzoning had been denied, the property owner had not been deprived of any constitutionally cognizable property interest, Justice Stevens wrote: "The Court does not adopt any such rationale . . . On the contrary, throughout this litigation everyone has assumed, without discussing the problem, that the Due Process Clause does apply."[8]

Although the entire Court agreed that procedural due process had to be afforded to citizens affected by a zoning decision, there is no suggestion, even in dissent, that the full panoply of procedures appropriate to trial-type or judicial proceedings be required before a legislative body exercises its zoning powers. Both dissenters only demanded a fair opportunity for affected landowners to be heard. *See Eastlake*, 426 U.S. at 680 (Powell, J., dissenting), 426 U.S. at 692-94 (Stevens, J., dissenting). As shown in Argument II(B), *infra*, Petitioners were manifestly provided with ample opportunity to present their positions, satisfying the demands of the *Eastlake* dissenters.

Furthermore, the fears which prompted the dissenters in *Eastlake* are not present here. The decision here involved numerous parcels of land covering a substantial area, instead of the single tract at issue in *Eastlake*. Thus, the procedure below did not focus on "the status of a single small parcel owned by a single 'person'." *Eastlake*, 426 U.S. at 680 (Powell, J., dissenting). Also, rather than being presented in a referendum to a possibly uninformed electorate unhampered by established decisionmaking stan-

[8] *Id.* at 681 (Stevens, J., dissenting). Petitioners do not argue and the record does not show that the value of their property in fact has been denigrated by the rezoning. As the Maryland Court of Appeals indicated, a higher total density may be possible for Petitioners' property under the current zoning than was available before. *See* C of A Opinion, 280 Md. at 724, 376 A.2d at 504 (Petition for Certiorari at 67a-68a). Thus, they are not aided by the distinction of *Eastlake* they argue.

dards, the issues here were determined by the Montgomery County Council, a legislative body whose decision was made on the basis of articulated findings subject to substantive review. *See* C of A Opinion, 280 Md. at 699-701, 376 A.2d at 491-92 (Petition for Certiorari at 20a-24a); Montgomery County Code § 59-208 (1972).

In addition, the Petitioners are fully protected against arbitrary treatment to the same extent that this Court found the petitioners were in *Eastlake*. Were the challenged amendment to lack a substantial relation to the exercise of the County's police power goals, a substantive due process argument would lie against it. *See* 426 U.S. at 676-77. Indeed such an argument was made to and rejected by the Maryland Court of Appeals. C of A Opinion, 280 Md. at 706-07, 376 A.2d at 494-95 (Petition for Certiorari at 34a-36a).[9] Also, were the zoning plan to work an individual hardship, individual relief would be available through application to the county board of appeals under Montgomery County Code § 59-122 (1972); *see* 426 U.S. at 674 n. 9, 679 n. 13. Thus, ample avenues are open to Petitioners to remedy any abuses committed by the Council. As the Court held in *Eastlake*, "[t]hat being so, nothing more is required by the Constitution." 426 U.S. at 677 (footnote deleted).

B. The Procedures Followed By the County Council Did Not Deprive Petitioners of the Due Process of Law

As the opinion of the Maryland Court of Appeals demonstrates, the decision at bar was arrived at following lengthy proceedings held in accordance with a detailed statutory pattern. *See* C of A Opinion, 280 Md. at 693-701, 376 A.2d at 488-92 (Petition for Certiorari at 9a-24a). Contrary to

[9] In this Court, Petitioners only argue the denial of a purely procedural right. No representation is made that the rezoning lacks the substantial relationship to the public welfare necessary to its validity. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

Petitioners' assertions, these procedures provided ample protection for their interests, fully complying with any constitutional requirements.

As this Court has held, the type of procedures necessary to assure due process vary with the character of the proceeding in question. *See Bi-Metallic Investment Co. v. Board of Equalization*, 239 U.S. 441 (1915);[10] *Duquesne Light Co. v. EPA*, 481 F.2d 1, 5-6 (3d Cir. 1973). The Court of Appeals applied this principle in its procedural determinations here. In *Hyson v. Montgomery County*, 242 Md. 55, 217 A.2d 578 (1966), the Maryland Court of Appeals had ruled that property owners were entitled to cross-examine opposing witnesses in hearings involving piecemeal, or single parcel, rezoning.[11] Although Petioners argued that the *Hyson* rule should be extended to the hearing on the Friendship Heights rezoning, the Court of Appeals declined to do so. Following the Montgomery County ordinance,[12] the court carefully distinguished the piecemeal rezoning in *Hyson* from the broader rezoning of a "substantial" area present here. C of A Opinion, 280 Md. at 702-06, 376 A.2d at 493-94 (Petition for Certiorari at 26a-34a).[13] In fact, the rezoning affected

[10] In *Bi-Metallic*, Justice Holmes wrote (239 U.S. at 445):

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. Generally statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard . . . . There must be a limit to individual argument in such matters if government is to go on.

[11] *Hyson* was decided entirely on statutory grounds without reference to federal constitutional requirements.

[12] Montgomery County Code § 59-195 (1972).

[13] Petitioners suggest (Petition for Certiorari at 20) that the Friendship Heights rezoning lost its comprehensive character because in-

the entire Village of Friendship Heights, a far cry from the parcel-by-parcel dispute Petitioners suggest occurred.

In these circumstances, a rezoning affecting development of an important commercial and residential area of the County, the Council properly determined that the relevant facts would be those concerning the entire area, rather than relating to individual tracts as would be considered in piecemeal rezoning. Moreover, the Council was aware that the proposed rezoning would affect large numbers of people, many of whom might wish to adduce evidence at a hearing.[14] In these circumstances, allowing unlimited oral testimony and cross-examination would entail an endless hearing. Instead, each landowner was allowed eight minutes of direct testimony and unlimited time at the end of the hearing to rebut any previous testimony. In addition, those wishing to appear were permitted to pool their times to allow more complex presentations. Finally, unlimited written presentations were allowed.[15]

There is no suggestion that the mass of material adduced at the hearings was not considered by the Council. Petitioners also do not suggest that they were in fact prevented from presenting any relevant material to the Council. Under the circumstances, the procedures adopted

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dividual tracts were separately characterized on the sectional map amendment. They fail to recognize the distinction between the overall zoning decision which they contest and the mere implementation of the policy determination through the sectional map.

[14] In fact, almost 200 people did appear at the hearings on the proposed zoning. The spectre of a hearing with that many participants having unlimited rights to present testimony and cross-examine any other participant shows the necessity of the sort of limitations the Council adopted.

[15] Contrary to Petitioners' assertion that no opportunity was afforded to cross-examine Planning Board staff members (Petition for Certiorari at 7), parties, including Petitioners, were invited at the hearings before the Planning Commission to submit written questions to the staff.

by the Council, as the Court of Appeals held,[16] provided ample protection for Petitioners' rights.

CONCLUSION

Petitioners' failure to properly assert a federal claim in the Maryland courts prevents them from now doing so here. In any event, their contention that an important federal question arises from the reasonable limitations placed on oral presentation and cross examination by the Montgomery County Council in this legislative proceeding is unsupported by this Court's decision in *Eastlake* or any other decision. To the contrary, the opinion of the Maryland Court of Appeals conclusively shows that Petitioners had ample opportunities to present their positions to the Council. The Constitution requires no more. Therefore, Respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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January 11, 1978

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[16] 280 Md. at 710-16, 376 A.2d at 497-99 (Petition for Certiorari at 42a-52a).

APPENDIX

Provisions of the Montgomery County Code (1972)

Sec. 59-122. Filing of petition; action of board or director.

(a) Filing of petition. Petitions for the grant of special exceptions shall be filed with the board, or when appropriate the director, on forms provided therefor. The petitioner shall submit plans and specifications or other data or explanatory material, stating the methods by which he will comply with the conditions specified for each grant of special exception. At the time of filing his request for a grant of special exception the petitioner shall pay to the board the fee set out in the board's rules of procedure, or when appropriate to the director the fee provided in subsection (d) of section 59-120.

(b) Notice of action. Notice of action taken by the board or the director, as the case may be, on each petition for special exception shall be transmitted to the petitioner, to the commission and to the director. In cases where special exceptions have been granted, the notice shall set forth the conditions, standards and safeguards or rules to which the special exception is subject.

(c) Zoning map to indicate special exception. Upon receipt of a notice of a grant of special exception, the commission shall indicate the same in the proper place on the zoning map by use of appropriate code number or symbol. (Mont. Co. Code 1965, § 111-34; 1972 L.M.C., ch. 16, § 5.)

Sec. 59-195. Classification.

Application for amendment of this chapter may be either proposals for amendment of the text of this chapter or proposals for amendment of the zoning map. A proposed amendment may be for a more or less intensive use and may be in form of:

(a) A local amendment covering a single tract, all portions of which are proposed to be classified in the same

zone; or all portions of which are proposed to be classified in one of two alternative zones.

(b) A sectional plan amendment covering a section of the Maryland-Washington Regional District, portions of which may be proposed to be classified in different zones.

(c) A district plan amendment covering the entire Maryland-Washington Regional District within the county. (Mont. Co. Code 1965, § 111-38; Ord. No. 6-34, § 1.)

Sec. 59-208. Same—Resolution; opinion and vote.

(a) The decision of the district council remanding to the examiner, approving, denying or dismissing any application for a map or text amendment shall be made in open session and shall be rendered within sixty days of the hearing or transmittal of the hearing examiner's report, whichever occurs later, unless such time is extended by the district council. The affirmative vote of five members of the district council shall be required to adopt the resolution granting a classification other than that recommended for the subject property on a detailed water shed or planning area master plan lawfully approved by the district council; provided, that in the event the classification sought is recommended for approval by the planning board, then the affirmative vote of four members shall be required to adopt the resolution granting the classification. In all other cases, an application shall not be granted except by the affirmative vote of four members of the district council. If the necessary total of affirmative votes as herein provided shall fail to be achieved for any reason, the application shall be held to be denied; no resolution need be adopted for such a denial and the minutes shall so reflect the denial for want of the necessary affirmative vote total. Any such denial for want of the necessary total of affirmative votes shall not be subject to the time limitation set forth in section 59-197. All resolutions adopted hereunder shall be accompanied by an opinion of the district council setting forth its conclusions and reasons which shall be filed in the application record.

A copy of the resolution and opinion shall be promptly mailed by the department to the applicant, the commission and to all persons entering their appearance at the hearing as shown by the hearing transcript; and a copy shall be promptly furnished by the department to the chief of the division of assessments, of the department of finance and the members of the board.

(b) The time for appeal from a final decision of the district council, including a denial for want of the necessary total of affirmative votes, as set forth in section 85-78A, shall begin to run from the date of the resolution or from the date the application was denied for want of the necessary total of affirmative votes, except as otherwise provided in section 59-209. (Mont. Co. Code 1965, § 111-49; Ord. No. 6-34, § 1.)